THE JUDICIAL OFFICE IN GERMANY

By Burt Estes Howard.

The judicial institutions of Germany are based upon imperial law: the *Gerichtsverfassungs-Gesetz* of January 27, 1877, with the revision of May 20, 1898. This legislation provides for four regular courts: the *Reichsgericht,* which is the sole *imperial* court, the *Oberlandsgerichte,* the *Landsgerichte* and the *Amtsgerichtc.* All judges in these courts are *appointed* and certain qualifications are demanded, by law, of those who would exercise the functions of the judicial office.[1]

In fixing by imperial legislation the requirements for eligibility to a judgeship, instead of leaving the matter to the determination of each several state, the Commission of Justice for the Reichstag simply carried to a logical conclusion certain ordinances already placed upon the statute-book. A uniform procedure, both civil and criminal, had been provided for the whole empire, in the *Civilprozessordnung* of January 30, 1877, with the amendments of May 17, 1895, and in the *Strafprozessordnung* of February 1, 1877. The Commission therefore argued that the law regulating the judicial institutions of the Empire, while it made no attempt at a complete organization, but sought rather to lay down the principles necessary to a harmonious operation of the laws of procedure, could not well dispense with general provisions touching the professional training and position of the persons in whose hands were to be placed, to a pre-eminent degree, the administration and application of those laws of procedure. The Report of the Sixth Commission of the Reichstag, 1898, says: "Agreeing with the views expressed by the various speakers in the general debate of the Reichstag, the Commission has wellnigh unanimously held it to be a logical necessity arising out of the ordinances establishing the civil and criminal procedure, to lay down, under the title 'The Judicial Office,' at least the minimal requirements for eligibility to the office of judge in the German Empire, and to prescribe those indispensable guarantees of judicial independence, which no German judge may ever be without. Sections 1-11 (of the *Gerichtsverfassungs-Gesetz*) adopted by the commission, make no attack on the judicial sovereignty of the individual states; at any rate, they go no farther in the organization of the judiciary than the ordinances regulating procedure require. They attach themselves to legal principles that have existed in Germany from old time, and they are essentially borrowed from the prevailing law of the greatest German state. . . . If imperial legislation is called upon to map out for the judge the civil and criminal

[1]For literature on the subject of the judicial office in Germany,see Jahrbuch der Preussischen Gerichtsverfassung, 24 Jahrg. 1900, § 7, 10 28 ff. The best discussion from the standpoint of constitutional law is found in *Laband,* Staatsrecht des Deutschen Reichs, 4 Ed., 1901, III., 335 ff. See also *von Rönne,* Staatsrecht des Deutschen Reichs, 2 Ed., II., 9 ff. *Zorn,* Staatsr. d. D. Reichs, II., 365 ff; *Schulze* Deutsches Staatsr., § 199; *Hâcel,* Deutsches Staatsr., I., 711 ff; *von Rönne-Zorn.* Staatsr. d. Preuss. Mon. 5 Ed., I. § 12, III., A, § 43. Also *Rsntelen,* Gerichtshof und Justizverwaltung 2 Ed., 1889; *Müller,* Preuss. Justizverwaltung, 5 Edin., 1901; *Pfafferoth,* Jahrb. d. D. Gerichtsverfassung, 7 Jahrg., 1898.

procedure which he must follow, and to define the judicial authority, it cannot possibly leave the several states free to settle, perhaps in ways wholly variant, the question of the preparatory training of the judge, and his place in the life of the state over against the governments and the people."[2]

In the *Gerichtsverfassungs-Gesetz,* therefore, imperial legislation has fixed the *minimum* of requirement for exercising the functions of a learned judge. The law, in other words, has drawn the line below which the qualifications of that person may not fall, who would be eligible to the judicial office in any one of the regular courts in Germany. According to the provisions of this law the German judge reaches the bench only after passing two rigid examinations.[3] The first examination must be preceded by a three years' study of law in a university, out of which period three semesters at least must have been devoted to legal study in a German institution. The *Gerichtsverfassungs-Gesetz* does not prescribe the conditions of the examination nor stipulate the particular subject upon which the candidate is to be tested. These matters are left to the legislation of each individual state.[4]

Between the first and second examinations at least three years must intervene. This period is to be spent in service at court, with an attorney, and, if so desired, with the Public Solicitor. Such service is not optional with the candidate. It is compulsory. It will be at once apparent that an embarrassing situation might arise for an ambitious young "jurist," who, however zealous he might be, could find no attorney disposed to set him at work. This point was brought up by representatives of the Bundesrat in the debate over the draft of the proposed *Gerichtsverfassungs-Gesetz.* These gentlemen declared that the provisions of the law could could not be carried out with any degree of certainty owing to the fact that there was no compulsory legislation attached, which would force the attorney to take the embryo lawyer as his assistant. It was proposed, therefore, by the representatives of the Bundesrat that service with an attorney should not be required of the candidate, but should be optional. This proposition was rejected by both the *Reichstagskommission* and the Reichstag. The awkwardness of the situation has been relieved, however, by incorporating

[2] Bericht der 66, Kommission d, Reichstags (Drucks. d. Reichstags, 9 Leg. Per. 5 Sess. Nr. 240).

[3] GvG. § 2, cl. 1. Attorneys must also pass these examinations before they are admitted to practice. Of course the passing of the examinations determines merely the question of eligibility. It creates no claim to the office of judge as of right.

[4] In Prussia the law provides that the first examination shall take place before a commission of the Oberlandesgericht in Königsberg, Berlin, Stettin, Breslau, Naumburg, Kiel, Celle, Cassel or Cöln. The subject matter covers both public and private law, as well as the general principles of Political Science. The examination also aims to test the positive knowledge of the applicant, his insight into the nature and historical development of legal relations as well as to determine whether the candidate, on the whole, possesses that general legal and political training requisite in his future profession. In Prussia, one who has passed the first examination, is appointed "Referendar" by the President of the Oberlandesgericht in whose district he is to be employed, and, since his position is now an official one, the oath is administered. One who has passed the second examination is known as an "Assessor." On the training of the Referendar see *Daubenspeck,* Der juristische Vorbereitungs-dienst in Preussen, Berlin, 1900.

into the law regulating matters pertaining to attorneys—the ***Rechtsanwaltordnung*** of July 1, 1878—a section which declares that an attorney is bound to furnish opportunity for practical work, as well as guidance, to the "jurists" who are engaged in their preparatory service.[5]

It has been remarked that the *Gerichtsverfassungs-Gesetz* determines only the *minimal* requirements for eligibility to the judicial office. While no state, by its legislation, may demand of its candidates less than the law of the Empire lays down as the minimum, any state may demand more, and as much more as it pleases. Each state may increase the length of time to be spent in university study prior to the first examination, or the period to be passed in service preparatory to the second.[6] Prussia, for example, requires an intervening period of *four* years between the first examination and the second, this time to be spent in service connected with the courts, with an attorney and with the Attorney of the State. The work of the Referendar is to be so distributed that he shall gain an insight into the operation of all branches of judicial activity, and such a practical facility therein as may be requisite for the independent and efficient administration of the office to which he is looking forward.[7]

The time devoted to preparation in one state of the Empire may be counted in every other state, whether it be spent in university study looking toward the first examination or in service with a view to the second examination. Further, he who has passed the first examination in one state may be admitted in every other state to the intermediate service in anticipation of the second examination and, when that service is fulfilled to the examination itself.[8] There is no compulsion, however, upon one state to give credit for the period of service or study spent in another. The wording of the law is "may," not "shall." The *Gerichtsverfassungs-Gesetz* merely empowers the Administration of Justice in any state to admit the validity and sufficiency of the work done, and examinations held in other states. As a matter of fact, several states make the passing of the examinations within their own territory an absolute condition of the assumption of the judicial office. A proposition to the effect that there should be compulsory reciprocity between the states in this respect was rejected by the Commission of the Reichstag on the ground that, owing to the lack of a uniform law regu-

[5] Rechtsanwaltordnung, § 40. See comments on this ordinance by *Sydow*, 4 Ed., Berlin, 1900. See also *Völk*, Die Rechtsanwaltord. für d. D. Reich. Nördlingen, 1878.

[6] But no state may require a greater *number* of examinations than *two*. *Struckmann & Koch*, Komm. z. Civilproz-Ord. II., 479, note 7.

[7] The employment of the Referendar in Prussia is as follows: 9 months service with an *Amtsgericht* having not more than 3 judges, 1 year in the *Landgericht*, 4 months with the Attorney for the State, 6 months with a lawyer and notary, 9 months in an *Amtsgericht* and 6 months in an *Oberlandesgericht*. Referendare who, by their conduct, prove themselves unworthy, or who do not make proper progress in their training, may be dismissed from service by the minister, without further procedure, after the chairman of the Board of Provincial Service has been heard. See § 84, Law of 21 July, 1852 (G. S. 465).

[8] GvG. § 3. Attempts toward securing a uniform system of examinations in all the states, made in the Reichstag of 21 May, 1878, (see Sten. Ber., 1476), and in the commission appointed to draft the new GvG. (see Kom. Ber. d. RTK. von 1898, 2 ff.) were without result. See also Schmidt, Lehrb. § 39.

lating the whole subject of examinations, there could be no adequate guarantee that the examinations required by the different states would be of equal value. Accordingly, the recognition by one state of the examinations held in another, and the estimate to be put upon the preparatory service performed there, lie wholly within the discretion of the State Administration of Justice.[9]

Every regular public teacher of law in a German university is eligible to the judicial office.[10] In other words, the installation of a man as full professor of law in a German university is regarded as equivalent to the required preparation and examination.[11] Moreover, "whoever has acquired eligibility to the judicial office in one of the states is also eligible to every judicial office within the German Empire, so far as the law (*i. e.*, the imperial *Gerichtsverfassungs-Gesetz*) makes no exception."[12] An important doctrine is here laid down. In some of the states, notably Prussia,[13] promotion to the higher positions on the bench was made contingent on certain conditions: a specified length of service in the lower courts, the attainment of a certain age, the passing of special examinations, etc. All state laws of this nature are wiped out by the imperial legislation which declares that a man eligible in one state to the judicial office is eligible to every judicial office within the German Empire. The *Gerichtsverfassungs-Gesetz* has made a single exception. In addition to his having attained eligibility to the judicial office in one of the states a judge of the *Reichsgericht* must have completed the 35th year of his age.[14]

Two general principles are laid down by law for the avowed purpose of securing the independence of the judiciary: (1) the judicial power shall be exercised only by *courts,* and (2) these courts shall be subject only to the law.[15] As to the significance of these clauses in the law, the *Motiven* say:—[16]

"The assignment of the jurisdiction to courts, by imperial legislation, has, over against the existing rights of the individual states, a negative significance in two directions: First, the meager traces, still existing in Germany, of the customary influence of the Landesherr upon the course and decision of suits at law, are wholly extinguished, and, in the second

[9] See *Struckmann & Koch* 480, notes 2 and 3 to § 3 GvG.

[10] GvG. § 4. Compare also § 138 *Strafprozessordnung.*

[11] "Ausserordentliche Professoren" and "Privatdozenten" do not come within the provisions of the law.

[12] GvG. § 5. There is no contradiction here to what has been discussed in the text with reference to crediting work done in another state. While no state is compelled to *declare* a man eligible on the basis of work done *elsewhere*, yet when one state *has pronounced* a man eligible no other state can question its action.

[13] Law of 12 Mar., 1869 (Preuss. Gesetzsamml. 482) §§ 2, 3 and 5.

[14] GvG. § 127, cl. 2.

[15] GvG. § 1. See Protokolls der Justizkommission d. D. Reichstags, Berlin, 1876, 73-76; Kom. Ber. 7-9; Sten. Ber., 2 Leg. Per., 2 Sess. 1874-75, 275 ff. Also *Wach, Handb.* d. D. Civilprozessordnung, I, 309 H.; *Schmidt,* Lehrb. d. D. CPO. § 25; *Bunsen,* Lehrb. d. D. CPO. § 2.

[16] Begrundung des Entwurfs III, (Drucks. d. Reichstags, 2 Leg. Per., 2 Sess. 1874–75 zu No. 6).

place, the administration of justice is fundamentally separated from administration in general.

(1) That judicial supremacy, by force of which state power has to establish and maintain legal order within its territory and administer legal authority, appertains to the several states themselves. The new legislation (referring to the *Gerichtsverfassungs-Gesetz* then being debated) would make no breach in this judicial supremacy so far as exercise of rights on the part of the individual state is concerned. After the passage of this law, as before it, the judicial power is to be referred back, for its source, to the supreme authority of the state. The state courts must operate as deputized by, and under the authority of, the ruler of the state. But every active personal interference of the sovereign in the administration of justice, all "cabinet justice"—which Political Science has long regarded as unpermissible and which, in fact, has been actually done away with in almost the whole of Germany—is excluded by the declaration that the ordinary jurisdiction is exercised by courts, and by courts alone. . . .

(2) In more recent times it has been a generally recognized principle that the judicial office, whose duty is the administration of law and equity, and which, from its very nature can have no authority above it other than that of the law, should not be administered by officials who, at the same time are called upon to exercise that kind of rule over the citizens of the state which must have regard for considerations of governmental policy, and who cannot be guaranteed, in like measure, that security of position through unremovability from office, which is desired in a judicial official."[17]

Two or three provisions of the *Gerichtsverfassungs-Gesetz* are intended to secure the *personal* independence of the judiciary. In the first place, the judges are appointed for life.[18] With respect to the members of the *Reichsgericht*—the only one of the regular courts which is purely *imperial*—the appointments are made by the Kaiser on nomination of the *Bundesrath*.[19] The matter of the appointment of the judges of the other courts, as well as the determination of the mode of installation, is left to the constitutional law of the several states.[20] Moreover, the judges receive a fixed salary, that is to say, a permanent, irrevocable salary, which cannot be subjected to arbitrary withdrawal or diminution. The receiving of fees is absolutely barred.[21] If, however, the judge is permitted to hold another office at the same time, in addition to the judgeship, the receiving of some form of remuneration other than that of the fixed salary attached to the judicial office is not excluded. Whether, and to what extent, a judge may assume such a "Nebenamt" is, with respect to the members of all courts other than the *Reichsgericht*, a matter for the state legislation to decide. So far as the judges of the

[17] Compare *von Rönne* op. cit. 15; *von Rönne-Zorn.* op. cit. § 12, III. A, § 43, I. 1; *Zorn.* op. cit. 412.

[18] GvG. § 6.

[19] GvG. § 127, cl. 1.

[20] In Prussia and Bavaria, *e. g.* it is provided by the *Ausführung-Gesetz* z. GvG., that all judges shall be appointed by the King.

[21] GvG. § 7.

Reichsgericht are concerned, the matter is settled by the *Reichsbeamten-Gesetz* of March 31, 1873, section 16: "No imperial official shall, without the previous consent of the highest imperial authority, assume an additional office or additional employment to which a continuous remuneration is attached, or carry on a business. The same consent is required for the entry of an imperial official into the directorate, or into the administration or supervisory council of any company operated for gain. Such consent will not be granted, however, insofar as the position is directly or indirectly bound up with a reward. A concession once granted may be revoked at any time."[22]

Perhaps the strongest guarantee for the personal independence of the judiciary is found in that section of the law which declares that "no judge shall, against his will, be permanently or temporarily removed from office, transferred to another place or retired except by judicial decision and on grounds and according to forms prescribed by law.[23] If the State Administration of Justice, however, changes the organization of the courts, or defines anew the districts of the same, it may also provide for such involuntary transfers as the reorganization necessitates, or even for involuntary removals under grant of full salary.[24]

The conditions of the law requiring that removals, transfers or retirements shall be made only by judicial decision, on legal grounds and according to legal forms, are not met when such action is based on ordinances of the Ruler, or on decrees of the State Administration of Justice. There must be actual legislation, imperial or state, behind the transaction. On the other hand, it is apparent that such a matter should not be left exclusively to the discretion or good pleasure of the judiciary. Hence in those states where no law on the subject exists, the judiciary cannot take the matter into its own hands. It would seem that state legislation must step in.[25] This section of the *Gerichtsverfassungs-Gesetz* covers cases of removal as a disciplinary measure (Enthebung), as well as mere removals with no disciplinary

[22] Reichsbeamtengesetz, § 16 (RG Bl. 61). See Gesetzsammlung für d. D. Reich. 4 Aufl I. 342. Compare for Prussia, Kab. Ord. 13 July, 1839 (G. S. 235); Law of 30 Apr. 1856 (GS.. 297); A. G. z. GvG. 24 Apr. 1877, § 11; Gewerbe-Ord., 17 Jan. 1845 (G. S. 41) § 19; Verord für d. neuen Landesteile, 23 Sept. 1867 (G. S. 1610): Reichsgew.-Ord. of 26 July. 1900 (RG.Bl. 871) § 12 cl. 2; Law of 10 June 1874 (G. S. 244); *Turnau*, op. cit. I. 42 ff.; *von Rönne-Zorn*, op. cit. § 43, II.

[23] GvG. § 8 cl. 1. This § is drawn in imitation of Art. 87, cl. 2 and 3 of the Preuss. Verf. Urkunden, and contains the principles which the German jurists designate as the "*Unabsetzbarkeit*" and "*Unversetzbarkeit*" of the judiciary.

[24] GvG. § 8 cl. 2. On motion of the chairman of the Reichstags-Kommission of 1875, it was expressly declared that those provisions in the laws of the several states whereby a judge on reaching a certain age may be pensioned on full or partial salary, should remain undisturbed.

[25] This is the view of *Struckmann & Koch*, note 5 to § 8 GvG. *Laband*, however, III. 454, note 5 says: "So lange in einem Bundesstaat ein solches Gesetz nicht erlassen ist, bleibt die Geltung des § 8 suspendirt." Section 13, Einführung-Gesetz. GvG. says: "Die Bestimmungen über das Richteramt im § 8 des GvG. treten in denjenigen Staaten, in welchen Vorschriften für die richterliche Entscheidung uber die Enthebung eines Richters vom Amte oder über die Versetzung eines Richters an eine andere Stelle oder in Ruhestand nicht bestehen, nur gleichzeitig mit der landgesetzlichen Regelung der Disciplinarverhältnisse der Richter in Wirksamkeit." This § owes its existence to the RTK of 1875 and was occasioned by the arrangements in some German states, especially Bayern, where no regular disciplinary process before judicial authorities exists.

character (Entfernung). The arbitrary ousting of a judge from his office by an Administrative authority on the vague ground that "the interests of the service" require it—which, as Laband observes, means "according to the pleasure of the Administrative Board," is made impossible. No mere considerations of policy can be set up as a justification for such a removal or retirement. While any change may be made with the consent of the judge, none can be made against it, save by orderly judicial process, based on law and not on ordinance.[26]

The judges are protected, therefore, from the arbitrary action of the State Administration of Justice, and, in all cases of disciplinary prosecution, have a claim to a legal hearing and to a judicial decision. No norm is laid down by imperial legislation, however, with respect to the infliction of disciplinary penalties, nor is there any uniform regulation of the disciplinary law touching judicial officers. Not even the most general principles are laid down by imperial legislation determining the grounds on which suspension, removal or dismissal may be permissible, establishing the rules of disciplinary procedure or fixing the constitution and composition of the disciplinary Boards. In all these matters the autonomy of the several states is practically unrestricted, being bound only by the formal limitation that action shall follow the way of legislation, not that of mere arbitrary decree or ordinance.[27]

The members of the *Reichsgericht* occupy a different position from that held by the other judges, so far as their relation to the disciplinary laws of the states is concerned. A temporary suspension from office takes place, according to law, when a member of the *Reichsgericht* is arrested pending investigation, and continues during the period of such detention. Moreover, a member *may* be temporarily suspended from office by the full bench of the *Reichsgericht,* after hearing the Attorney for the Empire, if trial has been begun against such member on a criminal charge.[28] The removal of a member, together with loss of salary, may be effected by a pronouncement of the full bench of the *Reichsgericht,* the Attorney for the Empire having been heard, if such member has been sentenced to punishment for a disgraceful act, or to imprisonment for more than a year.[29] If a member of the *Reichsgericht,* because of bodily infirmity or weakness of physical or mental power, becomes permanently incapacitated for office, but nevertheless does not apply for a retirement, nor, though requested to do so, sees fit to comply within a specified period, such member may, after both he and the Attorney for the Empire have had a hearing, be retired by the action of the full bench of the *Reichsgericht.*[30]

[26] The only exception to this rule has already been mentioned in a preceding paragraph.

[27] See *Laband,* III, 454 ff.

[28] GvG. § 129. That is, if the member is charged with a crime or misdemeanor, not merely with a trespass. Such a temporary suspension does not involve loss of salary.

[29] GvG. § 128.

[30] GvG. §§ 130, 131. In case of retirement, the member receives a certain portion of his salary as yearly pension. This pension, up to the completion of the tenth year of service, amounts to 20-60 of his salary, and increases at the rate of 1-60 each succeeding year up to the completion of the fiftieth year of service. The period of service is reckoned from the day on which he entered the public service, whether of the Empire, of a state or commune, or, in the state, as attorney.